Supreme Court, U.S.
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No. 94-408

In The

Supreme Court of the United States

October Term, 1994

REDWOOD VILLAGE PARTNERSHIP,
an Illinois Partnership,

Petitioner,

v.

JOHN GRAHAM, BLAINE NORDWALL, ROBERT WANNER, BARB HOWE, DON JOHNSON, AND CHARLES EHRHARDT,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I.

Are executive officials engaged in formal rulemaking entitled to absolute legislative immunity from suits for money damages brought against them in their individual capacities?

II.

Are the respondents entitled to qualified immunity if it should be determined that they are not entitled to absolute immunity?

PARTIES

Petitioner, Redwood Village Partnership, is an Illinois limited partnership. Gregory Cleveland, a Bismarck, North Dakota resident, and Elliot Simon, an Illinois resident, are the general partners.

Respondent John Graham was executive director of the North Dakota Department of Human Services. He currently is a resident of Ocala, Florida. Respondent Don Johnson was an employee of the Department of Human Services who is now retired and resides in Fargo, North Dakota. Blaine Nordwall was an assistant attorney general serving as legal counsel for the Department of Human Services who currently works for the Department of Human Services and resides in Bismarck, North Dakota. Respondents Robert Wanner, Barb Howe, and Charles Ehrhardt are all employees of the North Dakota Department of Human Services and reside in Bismarck, North Dakota.

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

Respondents respectfully request that this Court deny the petition for writ of certiorari seeking review of the Eighth Circuit's opinion affirming the district court's decision in this case. The Eighth Circuit's opinion is reported at 26 F.3d 839 (8th Cir. 1994) and the district court's opinion at 819 F.Supp. 867 (D.N.D. 1993).

STATEMENT OF THE CASE

Redwood Village is a state-licensed facility that provides "basic care" for the aged and the infirm. In 1984, Redwood's accountant and an Illinois attorney formed the petitioner, an Illinois limited partnership, and purchased the facility for investment purposes. [App. at 2-3].

The record below established that petitioner's intent was to operate the facility for a limited period of time and then sell it. The two sole shareholders of the closely held corporation that owned the facility prior to its purchase, Mr. and Mrs. John Hruby, continued to manage the facility for the petitioner after the sale.

At the time of its purchase, most, if not all, of Redwood's residents were on public assistance. Redwood would receive reimbursement for the care of the "public pay" residents from the county governments responsible for their care based upon a per-resident rate established by the North Dakota Department of Human Services [hereinafter "Department"]. Each year, the Department would establish a new rate for each facility serving "public pay" residents. The new rates would be applied prospectively for the upcoming year and would be based on a facility's allowable costs, including depreciation and interest costs. [App. at 3].

Redwood was not obligated to serve "public pay" residents, and there are basic care facilities in North Dakota that serve only "private pay" residents. The rates that can be charged "private pay" residents are not regulated.

Shortly after the purchase of Redwood, the petitioner became involved in litigation with the Department over the reimbursement rate set for Redwood for the fiscal year July 1, 1985, through June 30, 1986. This litigation was ultimately resolved in 1988 by the North Dakota Supreme Court in *Redwood Village v. N.D. Department of Human Services*, 420 N.W.2d 333 (N.D. 1988). The North Dakota Supreme Court unanimously found in favor of the Department on one issue, and on a 3-2 vote, in favor of the petitioner on the other issue. Upon conclusion of the litigation, the petitioner received the additional compensation to which it was entitled as a consequence of the supreme court's decision for the specific rate year in issue. Petitioner further received reimbursements consistent with the supreme court's decision for subsequent rate years until the rate-setting rules changed in 1989. [App. at 3-4].

In 1989, the Department substantially overhauled the rate-setting rules for facilities providing basic care to "public-pay" residents. The specific rules referenced by the petitioner were only a small part of the rule changes that were made, which are codified at N.D. Admin. Code ch. 75-02-07. The Department adopted the 1989 rule changes by formal rulemaking, which included notice of the proposed rulemaking, receipt and consideration of written comments, and a hearing. The petitioner participated in the rulemaking process.

The rules were promulgated by the Department pursuant to an express grant of legislative authority. N.D. Cent. Code § 50-06-14.2 [previously N.D. Cent. Code §§ 50-18-06 and 50-18-06.1 (now repealed)]. The rules

when adopted had the force and effect of law. N.D. Cent. Code § 28-32-03. [App. at 15-16].

The petitioner sold Redwood Village back to the Hrubys, allegedly at a loss, after the promulgation of the 1989 rule changes, but before the rule changes became effective. [App. at 4]. Petitioner claims it had no choice but to sell the facility at a loss. This is simply not correct.

The petitioner had the option of not continuing to serve "public pay" residents if it decided it would be no longer economic for it to do so. Further, if the rule changes were so obviously unconstitutional, as petitioner contends, the petitioner had the option of seeking injunctive relief in either state or federal court.

Petitioner asserts that one of the amended rules was a subversion of the previously referenced North Dakota Supreme Court decision. However, that decision only applied the rate-setting rules which were in effect for the 1985-1986 rate year. The decision has no relevance to this case because the rules were changed in 1989 and because there is nothing that prohibited the Department from changing the rules.

Petitioner also asserts that several of the rules adopted in 1989 applied only to Redwood; hence, petitioner argues the rulemaking process cannot be considered legislative in character. However, the Eighth Circuit and the district court both examined the rules, along with the underlying administrative record. Both the Eighth Circuit and the district court concluded the rules were general in scope and were not promulgated to apply only to Redwood. [App. at 6, 17].

One of the objectives of the Department in adopting the 1989 amendments was to tighten up the existing rules in terms of cost control. For the most part, this was accomplished by conforming the "basic care" rules to the more comprehensive "nursing home" rate-setting rules, which had been updated in 1984 in order to meet federal requirements. [App. at 3-4, 15]. However, there were some changes made to the "basic care" rules that were later also incorporated into the nursing home rules. In terms of cost control, one of the Department's specific concerns was the potential for abuse resulting from the repeated sale ("churning") of facilities and the claiming of excessive depreciation and interest expense for rate-setting purposes, as a consequence.

Another objective of the Department in making the rule changes was to lessen the administrative burdens on both the facilities and the Department in situations where the facilities would be serving both "basic care" and "nursing home" residents. Further, making the "basic care" and the "nursing home" regulations uniform allowed for an easier transition, and protected the public's interest, with regard to controlling costs, should a facility shift from serving one type of resident to another.

Petitioner complains about three particular changes in the rules. For the most part, the complained about changes were patterned after similar provisions that were already in effect for nursing homes under the existing nursing home rules.

One of the complained about provisions is N.D. Admin. Code § 75-02-07-04(8). This section provides that, if an operator sells an asset, or removes it from service,

any depreciation costs asserted after June 1, 1984, may be recaptured to the extent the sale price exceeds the undepreciated value of the asset. Although the provisions provide for recapture of excess depreciation taken prior to the effective date of the recapture provisions, the provisions are prospective in nature in that (1) the provisions only apply to asset transactions occurring after the effective date of the 1989 regulations, and (2) the mechanism for recapturing the depreciation provides for recapture only as an adjustment to future reimbursement payments. There is no recapture if the sale or the disposal price of the asset does not exceed its undepreciated value. Further, there is no recapture if a facility were to go out of business or were to stop serving public pay residents, because there would be no future payments from which to make the recapture.

The other two provisions challenged by the petitioner are N.D. Admin. Code §§ 75-02-07-04(7) and 75-02-07-05(1)(a)(7). Petitioner claims these provisions would have lowered the amount of depreciation and interest expense that the petitioner could have claimed for future rate years after the effective date of the regulations. Since the petitioner sold its facility prior to these regulations taking effect, the Department did not have the opportunity to construe and apply these two particular regulations to the petitioner. However, assuming the provisions regarding depreciation and interest would have been applied as the petitioner suggests, the operation of the two regulations is clearly prospective in that they affect only the amount of depreciation and interest that could be claimed in future rate years after the effective date of the regulations. There is nothing in the newly

adopted regulations that allows the counties to go back and recalculate reimbursements for prior rate years and demand a refund.

Petitioner claims that it was the only facility that was impacted by the three complained about rule changes. This is simply not correct. While the impact on Redwood may have been greater under certain circumstances (if all of the changes from the three complained about rules had been actually applied to Redwood), other facilities were also impacted by the regulations.

For example, all facilities are subject to the recapture of depreciation provisions for excess depreciation taken after June 1, 1984 – not just facilities acquired after that date. Further, the petitioner looks at the rule changes, particularly the two changes affecting the allowable basis for claiming future depreciation and interest expense, only from the perspective of a purchaser. In fact, the "investment expectations" of all facility owners, who someday might be sellers, were upset by the regulations. After the passage of the regulations, prospective purchasers undoubtedly were willing to pay less money than before for facilities to be used for serving "public pay" residents. This is because the allowable basis for calculating depreciation and interest expense after the passage of the regulations could be no greater than the seller's basis.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The claimed conflict in the circuits is illusory.

The only two circuit court cases that have squarely addressed the issue of whether executive department officials engaged in formal rulemaking are entitled to absolute "legislative" immunity from damage suits, brought against them in their individual capacities, are the Eighth Circuit's decision in this case and the decision of the District of Columbia Circuit in *Jayvee Brand, Inc. v. United States*, 721 F.2d 385 (D.C. Cir. 1983). The District of Columbia Circuit, in an opinion written by Judge Bork, concluded, as did the Eighth Circuit, that absolute legislative immunity protects agency officials from suits for damages when the agency officials are engaged in the quasi-legislative activity of formal rulemaking.

Petitioner relies on the Fifth Circuit case of *Walter v. Torres*, 917 F.2d 1379 (5th Cir. 1990), as creating the conflict. However, it does not appear that the applicability of absolute "legislative," as opposed to "judicial," immunity was ever raised in that case. For this reason, and because of the existence of other Fifth Circuit cases that call into question the decision reached by the particular Fifth Circuit panel that considered *Walter*, it does not appear the Fifth Circuit has explicitly resolved the issue presented by the petitioner.

In *Walter*, a prisoner sued members of the Texas pardon board for adopting and enforcing a procedural rule that stated a hearing was not required in parole revocation cases when the basis for revocation was a conviction for a felony offense committed while on

parole. This rule was contrary to a state statute, which, without exception, required hearings in all parole revocation cases. The district court dismissed the prisoner's civil rights action holding that the Board of Pardons members were absolutely immune from suit.

The plaintiff in *Walter* then appealed. The Fifth Circuit held the Texas Board of Pardons had in fact violated the prisoner's due process rights because the Board of Pardons had not held the required hearing. *Id.* at 1382-1383. The court then went on to conclude that, although the Board of Pardons' members were entitled to absolute immunity when making particular decisions with regard to parole, the members were not entitled to absolute immunity for enacting a rule that stated a hearing was not required in parole revocations based on felony convictions if the plaintiff could prove that the enactment of the rule caused the Board not to hold the hearing. *Id.* at 1384-1385. The panel deciding the case stated it was relying upon the distinction drawn between administrative and adjudicative functions in the prior Fifth Circuit case of *Farrish v. Mississippi State Parole Board*, 836 F.2d 969 (5th Cir. 1988). 917 F.2d at 1383.

A careful review of *Walter v. Torres* will indicate that the only issue explicitly decided was whether absolute "judicial" immunity, typically afforded parole officials because of the adjudicatory nature of the parole process, should apply to the passage of a procedural rule. The panel considering the case decided absolute judicial immunity should not apply, concluding the passage of the rule was not an adjudicatory function. *Id.* at 1383-1384. The panel viewed the passage of the rule as

being "administrative" in the same sense that the challenged conduct of the official held liable in the *Farrish* case was considered to be administrative. *Id.*

However, the challenged conduct on the part of the official held liable in *Farrish* was functionally different. The challenged conduct in that case was the purported failure on the part of the Commissioner of the Department of Corrections in Mississippi to establish proper policies and procedures for ensuring that constitutional rights are not violated. 856 F.2d at 976. In *Farrish*, it is questionable whether the challenged conduct could be considered "legislative," since the case did not involve the enactment of rules having the force and effect of law pursuant to a delegation of power from the legislature.

The Fifth Circuit panel in *Walter v. Torres* does not appear to have considered the issue of whether absolute immunity commonly afforded those acting in a legislative capacity should apply. The opinion does not explicitly raise the point, and the mechanical application of the result reached in *Farrish v. Mississippi State Parole Board* further suggests it was not considered. For this reason, *Walter v. Torres* should not be relied upon as creating the conflict in the circuits claimed by the petitioner.

Further, such an expansive reading of *Walter* would appear to be at odds with other Fifth Circuit decisions such as *Calhoun v. St. Bernard Parish*, 937 F.2d 172 (5th Cir. 1991) and *Hughes v. Tarrant County Texas*, 948 F.2d 918 (5th Cir. 1991). In *Hughes*, the Fifth Circuit stated generally that "legislative immunity not only protects legislators; it also protects officials fulfilling legislative functions." *Id.* at 920.

2. Granting executive department officials absolute immunity for formal rulemaking is consistent with prior cases decided by this Court, is likely only to be applied in limited numbers of cases, and is desirable from the standpoint of public policy.

The Eighth Circuit's decision in this case is consistent with prior decisions of this court, including specifically the following trilogy of cases: *Butz v. Economou*, 438 U.S. 478 (1978); *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979); and *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719 (1980). In these cases, this Court has held the following:

(1) that executive department, and other non-elected officials, can claim either judicial or legislative absolute immunity, as the situation warrants, even though the officials are neither judges nor elected legislators [*Butz & Lake Country Estates*];

(2) that the test for determining whether an official is entitled to absolute immunity is a functional test with the focus being on the particular activity performed by the official, rather than on the status or location of the official's office [*Butz, Lake Country Estates, & Consumers Union*]; and

(3) that rulemaking is a legislative function [*Consumers Union*];

(4) that officials exercising delegated legislative authority are entitled to legislative immunity [*Lake Country Estates & Consumers Union*]; and

> (3) that non-legislators engaged in rulemaking pursuant to a delegation of legislative authority are entitled to absolute immunity [*Consumers Union*].

When these cases are considered together, there seems to be little doubt about the correctness of the Eighth Circuit's decision in this case. Judge Bork in *Jayvee Brand, Inc.* reviewed the *Butz, Lake Country Estates,* and *Consumers Union* trilogy of cases, and concluded:

> From all this it is clear that when an agency exercises quasi-legislative regulatory authority, action for money damages against agency members will not lie.

721 F.2d at 395.

Petitioner claims that rulemaking and rate-setting are "administrative" in nature; hence they are not entitled to the protection of absolute legislative immunity. However, as the Eighth Circuit pointed out below (App. at 6-8), this Court has already held that formal rulemaking is a legislative function. *See Consumers Union* at 731. The same is true for rate-setting even though rate-setting is not an issue in this case. *New Orleans Public Service, Inc. v. Council of the City of New Orleans,* 491 U.S. 350, 370-372 (1989); *Prentis v. Atlantic Coast Line Co.,* 211 U.S. 210, 226 (1908). This case only involves the promulgation of formal rules from which rates would later be determined. As pointed out previously, the complained about rules were never actually applied by the North Dakota Department of Human Services to the petitioner.

Petitioner claims there is no historical basis for applying absolute legislative immunity to formal

rulemaking. However, the concern this Court has shown in recent cases for finding historical precedent for the extension of absolute immunity relates more to activity that is on the periphery of a function that the Court has already declared to be protected by absolute immunity. *E.g., Buckley v. Fitzsimmons*, 113 S.Ct. 2606 (1993) (determining whether a prosecutor talking to the press traditionally was considered to be a prosecutorial function). In this case, we are not dealing with an activity that is on the periphery of what traditionally has been considered legislative activity, *e.g.*, public distribution of press releases and newsletters by a legislator, for example. *See Yeldell v. Cooper Green Hosp., Inc.*, 956 F.2d 1056, 1062 (11th Cir. 1992). Rather, we are dealing with conduct that this Court has already declared in the previously cited cases to be a legislative function.

Petitioner raises the specter that the Eighth Circuit's decision in this case greatly expands the scope of absolute immunity and insulates all executive rulemaking from judicial review. Petitioner bases its argument upon the fact that legislators traditionally have been afforded absolute immunity from injunctive relief, as well as, immunity from suits for money damages. Petitioner's argument, however, is seriously flawed for several reasons.

First, application of absolute legislative immunity in this situation will not insulate allegedly unconstitutional regulations from judicial review. This is because an action for declaratory and injunctive relief can be brought against the officials who are responsible for the administration of the regulations regardless of whether the particular persons who promulgated the regulations are immune from suit for injunctive relief. *E.g., Consumers*

Union at 734-737. Further, if the persons who promulgated the regulations have the dual responsibility for later administering them, any immunity from claims for equitable relief that might have attached as a result of promulgating the regulations will not apply when the person is acting in the capacity as the administrator of the regulations. *Id.* In *Consumers Union*, this Court held that the Virginia Supreme Court was absolutely immune from suit for injunctive relief, for the purely legislative activity of promulgating rules of professional responsibility, but was not immune from injunctive relief when acting as the enforcing authority for the Virginia Code of Professional Responsibility. *Id.*

Thus, even if absolute immunity were applied to bar suits for injunctive relief against those persons acting purely in a legislative capacity, it would not insulate the resulting regulations from judicial review and the granting of either declaratory or injunctive relief, as the petitioner claims. *See id; cf., New Orleans Public Service, Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 370-372 (1989). This is essentially what the Eighth Circuit concluded in this case when it stated the following:

> The absolute immunity we confer upon the Department officials is for their conduct of rulemaking. Suits for declaratory and injunctive relief are still available to challenge regulations.

[App. at 8].

The second reason why the petitioner's argument is flawed, and why the Eighth Circuit's decision in this case will not greatly expand the application of absolute immunity, is because in most cases there will have been some

administration or enforcement of the regulations and absolute legislative immunity will not protect executive officials from damage claims that arise in that situation. *E.g., Consumers Union* at 734-738. It is only in rare cases, such as this one, when the only complained about conduct is the passage of allegedly unconstitutional regulations, that absolute immunity will apply. The paucity of cases addressing the application of absolute legislative immunity to formal rulemaking is good evidence of the fact that this situation does not arise very often.

Further, there are legitimate policy reasons for applying absolute legislative immunity to formal rulemaking. At the rulemaking stage, it is often impossible to foresee all of the possible ramifications that far-reaching rules of general applicability, such as the ones involved in this case, might have. To expose public officials at this point to the threat of damage suits would be counterproductive and would unduly inhibit the rulemaking process. This was the conclusion of the court below. [App. at 8]. It is also one of the reasons expressed by this Court for extending absolute legislative immunity to persons exercising legislative functions. *Lake Country Estates* at 404-405.

The situation is different, however, when it comes time to actually apply the regulations to a concrete situation. At this point, the executive department officials should have a better understanding of what will be the ramifications of applying the regulations. In this situation, it is not unfair to hold them accountable for conduct that is clearly wrongful.

Finally, the Court need not decide in this case whether the grant of absolute immunity from suits for damages necessarily requires that the respondents also be deemed immune from actions for injunctive and declaratory relief. This is because there is no claim for injunctive relief in this case. However, even if there were, affording absolute immunity from claims for both damages and equitable relief would not have the disastrous implications claimed by the petitioner for the reasons previously discussed.

Furthermore, just because, historically, the scope of absolute legislative immunity for legislators includes immunity from claims for injunctive and declaratory relief does not mean this has to be the scope of absolute legislative immunity that is applied to executive department officials performing a legislative function. Absolute immunity is a common law doctrine, and certainly the courts have the power to tailor the application of the doctrine to fit the purposes for which it is being applied.

Petitioner states that there is no support for such a position. The Fifth Circuit, however, has essentially so held in *Calhoun v. St. Bernard Parish*, 937 F.2d 172, 174-175 (5th Cir. 1991). In this case, the Fifth Circuit held that claims for injunctive and declaratory relief can be brought against state officials in their "official" capacities even though the same officials are protected by absolute legislative immunity from suits for damages brought against them in their personal capacities.

3. The second issue raised by the petitioner, as to whether rules with a particularized impact should be regarded as legislative, is not worthy of certiorari.

Petitioner argues that the complained about rules applied only to the petitioner. Hence, the petitioner argues the rules cannot be truly legislative in nature and absolute immunity should not have been applied. However, petitioner's claims in this regard are simply not correct as pointed out in the Statement of the Case set forth above. Both the district court and the Eighth Circuit below considered these same arguments and rejected them after considering the scope of the rule changes that were made, the language of the rule changes, and the administrative record. Both the district court and the Eighth Circuit concluded that the rules the petitioner now complains about, by their terms, apply to all "basic care" facilities. [App. at 6 & 17].

With regard to this second issue, the petitioner does not claim any conflict in the circuits. Rather, all that the Court would be doing by considering this issue would be second-guessing the interpretations of the rules that have been made by the district court and the Eighth Circuit. This is not an issue of national importance and is not worthy of the grant of certiorari.

Respondents would urge the Court to order the record from the court below and examine the comprehensive rule changes that were made, along with the "nursing home" rules from which the "basic care" rules were derived, before granting certiorari as to this issue. The respondents believe the Court would quickly conclude, if

it did so, that the lower courts were correct and that there is no issue here at all.

4. Even if this Court were to decide that the respondents are not entitled to absolute immunity, the judgment must be affirmed because the respondents are clearly entitled to qualified immunity.

The issue of qualified immunity was raised, briefed, and argued by the respondents in both the district court and the court of appeals, as an alternative grounds for dismissal of the action. Both the district court and the court of appeals declined to reach the issue because of the determination that the respondents are entitled to absolute immunity.

In this case, the alleged wrongfulness of the challenged conduct is by no means clearly established. In fact, if anything, the decided case law suggests that there is no constitutional infirmity with the complained about regulations.

For example, one of the regulations complained about by the petitioner provides for the recapture of excess depreciation taken prior to the effective date of the regulations in certain limited situations, such as when a facility asset is sold, or is taken out of service, as an adjustment to future rates. In a somewhat similar context, the courts of appeals have considered the constitutionality of recapture of accelerated depreciation under the federal Medicare program. For the most part, the retrospective aspects of the regulations involved in those

cases were upheld as serving a rational regulatory purpose and survived constitutional attack. *Fairfax Nursing Center, Inc. v. Califano*, 590 F.2d 1297, 1301-1302 (4th Cir. 1979); *Summit Nursing Home, Inc. v. United States*, 572 F.2d 737, 742-744 (Ct. Cl. 1978); *Adams Nursing Home of Williamstown, Inc. v. Mathews*, 548 F.2d 1077, 1080-1082 (1st Cir. 1977); *Springdale Convalescent Center v. Mathews*, 545 F.2d 943, 955-956 (5th Cir. 1977); *Hazelwood Chronic & Convalescent Hospital, Inc. v. Weinberger*, 543 F.2d 703, 708 (9th Cir. 1976), *vacated and remanded on other grounds*, 430 U.S. 952 (1977); *but see Daughters of Miram Center for the Aged v. Mathews*, 590 F.2d 1250, 1259-1263 (3rd Cir. 1978).

The federal Medicare provisions that allowed accelerated depreciation in certain situations for calculation of provider reimbursement rates were later repealed. More recently, a number of courts of appeal have considered substantive challenges to recapture of excess depreciation regulations more closely analogous to the regulations involved in this case under the Medicare and Medicaid programs. Although the constitutionality of the regulations was not directly in issue in these cases, most of the circuit courts of appeal, including the Eighth Circuit, have upheld similar recapture regulations. *E.g., Creighton Omaha Regional Health Care v. Sullivan*, 950 F.2d 563 (8th Cir. 1991); *Hoodkroft Convalescent Center, Inc. v. State of New Hampshire, Div. of Human Services*, 879 F.2d 968 (1st Cir. 1989); *Professional Medical Care Home, Inc. v. Harris*, 644 F.2d 589 (7th Cir. 1980); *Stewards Found. v. United States*, 654 F.2d 28 (Ct. Cl. 1981); *contra, Mercy Community Hospital v. Heckler*, 781 F.2d 1552 (11th Cir. 1986).

With regard to the complained about regulations that adjusted the basis for calculating the amount of depreciation and interest expense that would be considered in determining future rates, there are at least two cases that have upheld similar regulations against constitutional attack on the same grounds alleged by the petitioner below. *E.g., Hempstead General Hospital v. Whalen,* 474 F.Supp. 398 (E.D.N.Y. 1979), *aff'd without opinion,* 622 F.2d 573 (2nd Cir. 1980); *Anco, Inc. v. State Health and Human Services Finance Commission,* 388 S.E.2d 780 (S.C. 1989).

Finally, this Court has held generally that regulatory programs of this nature can be changed without raising due process concerns as to those persons already providing services to the programs. *E.g., F.H.A. v. Darlington, Inc.,* 358 U.S. 84 (1958). More specifically, a number of cases have held that providing services to comparable programs, such as Medicare or Medicaid, on a voluntary basis does not give rise to protectable rights under the Due Process Clause to make a profit. *E.g., Livingston Care Center, Inc. v. U.S.,* 934 F.2d 719, 720-721 (6th Cir. 1991) ("Providers of health care who choose to participate in this federally sponsored program for the aged and disabled do so with no guarantee of solvency."); *Whitney v. Heckler,* 780 F.2d 963, 968-973 (11th Cir. 1986); *Minn. Ass'n of Health Care Facilities, Inc. v. Minn. Dept. of Pub. Welfare,* 742 F.2d 442, 445-447 (8th Cir. 1984), *cert. denied,* 469 U.S. 1215 (1985); *Springdale Convalescent Center v. Mathews,* 545 F.2d 943, 955-956 (5th Cir. 1977); *Hazelwood Chronic & Convalescent Hospital, Inc. v. Weinberger,* 543 F.2d 703, 708 (9th Cir. 1976), *vacated and remanded on other grounds,* 430 U.S. 952 (1977); *Hempstead General Hospital v. Whalen,* 474 F.Supp. 398, 411 (E.D.N.Y. 1979), *aff'd without opinion,* 622

F.2d 573 (2nd Cir. 1980). In fact, a provider's participation in these types of social programs can even be terminated without infringing upon substantive due process rights because of the lack of any protectable interest which accrues through participation in such programs. *E.g., Senape v. Constantino*, 936 F.2d 687 (2nd Cir. 1991); *Kelly Kare, Ltd. v. O'Rourke*, 930 F.2d 170, 175-177 (2nd Cir. 1991), *cert. denied*, 112 S.Ct. 300 (1991).

Given the foregoing, it can hardly be said that the unlawfulness of the challenged conduct, if there was any, was so clearly established that the respondents should be held personally liable for money damages. Hence, respondents are entitled to qualified immunity and a judgment of dismissal, regardless of whether or not absolute immunity is applied. *E.g., Anderson v. Creighton*, 483 U.S. 635 (1987); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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